

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

TINYBUILD LLC, a Washington limited  
liability company,

Plaintiff,

v.

NIVAL INTERNATIONAL LIMITED, a  
Cypriot corporation, and SERGEY  
ORLOVSKIY,

Defendants.

CASE NO. 2:19-cv-00805 TSZ

PLAINTIFF'S MOTION TO AMEND  
COMPLAINT

**I. INTRODUCTION**

Plaintiff tinyBuild LLC ("Plaintiff"), through undersigned counsel, moves pursuant to Fed. R. Civ. P. 15(a) and this Court's Scheduling Order (Dkt. 20), for leave to file the proposed First Amended Complaint submitted herewith.<sup>1</sup>

**II. BACKGROUND**

tinyBuild is a video game developer and publisher based in Bellevue, Washington. Dkt. 1 ("Complaint"), ¶ 1. In 2018, tinyBuild, Defendant NIVAL International Limited ("NIVAL") and

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<sup>1</sup> Plaintiff attached both the proposed First Amended Complaint and a redline comparison showing the revisions from the original Complaint.

1 non-party Savvas Petras entered into a Development and Publishing Agreement (“the  
 2 Agreement”). *Id.*, ¶5. Under the Agreement, Savvas Petras would design, and NIVAL would  
 3 develop, a video game (the “Product”) that tinyBuild would then publish. *Id.*, ¶ 8. The Agreement  
 4 includes a funding schedule tied to milestones where tinyBuild agreed to pay NIVAL funds in  
 5 advance and in return NIVAL agreed to develop the Product through defined Milestones.

6 This litigation arises from the fact that NIVAL breached the Agreement and has, through  
 7 its actions, denied tinyBuild the benefit of its invention, including access to and possession of  
 8 source code and other intellectual property assets tinyBuild rightfully owns under the Agreement.  
 9 Specifically, after tinyBuild paid NIVAL milestone payments of \$500,000, NIVAL refused to  
 10 continue work on the Product unless tinyBuild paid it additional funds beyond what was provided  
 11 in the Agreement. NIVAL also locked the designer, Savvas Petras, out of the project and refused  
 12 to provide tinyBuild with the Product source code, which the Agreement unequivocally provides  
 13 is the property of tinyBuild. By Complaint dated May 29, 2019, tinyBuild initiated this litigation,  
 14 bringing claims of Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair  
 15 Dealing based on NIVAL’s wrongful conduct, and a claim for declaratory relief seeking a  
 16 declaration of its rights under the Agreement. Complaint, ¶¶ 19-35. NIVAL subsequently brought  
 17 Counterclaims against tinyBuild. Dkt. 8, ¶¶ 23-34.

18 Documents produced in discovery by NIVAL reveal additional wrongful conduct by  
 19 NIVAL and NIVAL CEO Sergey Olovskiy’s direct participation in such wrongful conduct. More  
 20 specifically, NIVAL produced internal communications demonstrating, among other things that:

- 21 1) At the direction of Sergey Olovskiy, NIVAL intentionally deprived tinyBuild of
- 22 possession of its source code as leverage to demand additional money from tinyBuild.<sup>2</sup>
- 23 2) After stopping work on the Product and disabling servers hosting the Product, locking
- 24 the lead designer out of the project, and receiving notice of termination of the

25 <sup>2</sup> Declaration of Diana S. Breau, ¶ 2, Exhibit 1. The documents submitted with this motion are a small sample of  
 26 the materials relevant to Plaintiff’s proposed new claims.

1 Agreement, NIVAL contrived a scheme by which they would feign continued  
 2 development of the Product and purport to deliver a Beta Milestone to NIVAL – all in  
 3 attempt to extract additional funds from tinyBuild.<sup>3</sup>

4 3) NIVAL apparently intended to (and did) use tinyBuild’s milestone payments for  
 5 purposes other than the Product, and NIVAL intends to use tinyBuild’s intellectual  
 6 property for other projects<sup>4</sup>

7 These documents were received from NIVAL in the course of discovery.<sup>5</sup> Further, NIVAL  
 8 produced the documents in their original Russian-language format, so the full impact and  
 9 understanding of the documents could be discerned only after tinyBuild had them translated.<sup>6</sup>

10 As further discussed *infra*, the discovery materials produced by NIVAL give rise to  
 11 additional claims against NIVAL – specifically, NIVAL’s continued retention of tinyBuild’s  
 12 source code and its apparent intention to use tinyBuild’s intellectual property for unrelated  
 13 projects with third parties establish NIVAL’s liability for misappropriation of trade secrets and  
 14 conversion. Finally, because the evidence demonstrates that Sergey Olovskiy led and participated  
 15 in these tortious acts, tinyBuild additionally seeks leave to add him as a named defendant in this  
 16 action.

17 Pursuant to the discovery order in this case, the deadline for amending pleadings is March  
 18 2, 2020. Dkt. 20. Thus, the instant motion and proposed First Amended Complaint filed herewith  
 19 are timely filed as to NIVAL. Based on the evidence described above, tinyBuild additionally  
 20 seeks to add Sergey Olovskiy as an additional named party in this action, and respectfully requests  
 21 that this Court extend, as necessary, the deadline for adding parties to accommodate the addition  
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 24 <sup>3</sup> *Id.*, ¶ 2, Exhibit 2.

25 <sup>4</sup> *Id.*, ¶ 3, Exhibit 3.

26 <sup>5</sup> *Id.*, ¶¶ 2-4.

<sup>6</sup> *Id.*

1 of Mr. Olovskiy on the ground that tinyBuild only learned of his participation in NIVAL's tortious  
 2 conduct through the recently produced discovery materials.<sup>7</sup>

### 3 III. ARGUMENT

4 Fed. R. Civ. P. 15(a)(2) instructs that leave to amend a complaint "should freely [be] given  
 5 when justice so requires." In this Circuit, this standard is applied "with extreme liberality."  
 6 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003).

7 In considering a motion to amend, courts evaluate the factors set forth in  
 8 *Forman v. Davis*, 371 U.S. 178, 182 (1962), which include "undue delay, bad faith or  
 9 dilatory motive on the part of the movant, repeated failure to cure deficiencies by  
 10 amendments previously allowed, undue prejudice to the opposing party by virtue of  
 11 allowance of the amendment, [and] futility of amendment[.]"

12 The consideration of prejudice to the non-moving party carries the most weight.  
 13 *Eminence*, 316 F.3d at 1052. If a court does not find prejudice or a "strong showing" of  
 14 the *Forman* factors, there is a "presumption" under Rule 15(a) in favor of granting leave  
 15 to amend. *Id.* Prejudice must be substantial for leave to be denied. *Morongo Band of*  
 16 *Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990).

17 There is no prejudice to NIVAL nor, as concerns the naming of Mr. Orlovskiy as a  
 18 Defendant, to him. Mr. Orlovskiy, NIVAL's founder and CEO, can claim no surprise from being  
 19 added as a defendant given his role in the company and underlying transactions, and the  
 20 allegations in the Complaint. There are three months remaining for discovery under the current  
 21 case schedule and none of the *Forman* factors favor dismissal. And there has been no delay or bad  
 22 faith in bringing this motion. To the contrary, Plaintiff has brought this motion promptly after  
 23 receiving English translations of materials produced by NIVAL in this case.<sup>8</sup>

24  
 25 <sup>7</sup> The Minute Order Setting Trial Date and Related set September 11, 2019, as the deadline for joining additional  
 parties. Dkt. 20, at 1.

26 <sup>8</sup> See Declaration of Diana S. Breaux ¶¶ 2-4.

1 Nor is the amendment futile. Plaintiff seeks to add two additional claims based on the  
2 newly discovered evidence. Specifically, NIVAL's wrongful retention and misuse of tinyBuild's  
3 trade secret source code gives rise to claims of misappropriation of trade secrets in violation of  
4 state and federal law, and a common law claim of conversion. Finally, because newly discovered  
5 evidence reveals that Sergey Olovskiy personally directed and participated in NIVAL's conduct,  
6 tinyBuild further seeks leave to add him as a named defendant in this action.

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8 Based on the foregoing, tinyBuild respectfully requests that the Court grant it leave to file  
9 the proposed First Amended Complaint attached to this motion, which relief is squarely within the  
10 Court's discretion and consistent with the application of Rule 15's directives.

11 DATED this 2<sup>nd</sup> day of March, 2020.

12 Respectfully submitted,

13 SUMMIT LAW GROUP, PLLC  
14 Attorneys for Plaintiff

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